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AUTHOR Hoffman, Susan L.
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ABSTRACT

This paper points out that a basic difference between the incarceration of men and that of women is that women are often the sole or primary caretakers of children at the time they are arrested. The disposition of the children varies greatly among states, and may involve anything from a court-ordered termination of the mother's parental rights to a temporary and casual placement of the child in the home of a relative. The paper reviews the literature on attachment theory, then discusses the damage that may be done to a young child by abrupt separation from its primary caretaker. It is suggested that for children under the age of three years, unless the mother has been abusive or grossly negligent in her child care, the best interests of the child may require that prisons provide nursery facilities so that infants can remain with their mothers for the period of incarceration, or until the infants have outgrown the critical period for forming the attachment bond. The paper also contains a brief summary of the legal and psychological problems inherent in terminating parental rights upon incarceration and also in providing temporary care for these children in foster homes. (Author)

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WHAT HAPPENS WHEN A MOTHER GOES TO PRISON?

An Overview of Relevant Legal and Psychological Considerations

Susan L. Hoffman, Ph.D.
Yale Law School

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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Serving a prison term causes hardship for anyone, as indeed it is supposed to. But for a particular class of offender--that is, women who have children--going to prison may have detrimental effects that are far more serious and far more pervasive than those actually contemplated by our criminal justice system. The prolonged separation of a mother and her young child, for whatever reason, can cause great pain to the mother, but more importantly, can cause extensive damage to the emotional development of the child who, in most cases, is totally innocent of any wrongdoing. In assuming that criminals are, by definition, bad parents, criminologists have avoided confronting the very important fact that separating mothers from their young children often makes those children develop into withdrawn and antisocial adults. It may be that criminals must be incarcerated, but certainly provisions can and should be made to ensure that the damage done to the affected mothers and children is minimized. Substantial research from the social sciences suggests that both mother and child would fare better in the long run if the bond between them was maintained and strengthened rather than abruptly torn during the mother's incarceration. In other words, the best interest of both the mother and child may require a rethinking of some critical notions in corrections and juvenile justice. The purpose of this paper, then, is (1) to summarize the current law and practice governing the disposition of the children of incarcerated women; (2) to review the legal and psychological problems with current practices; and (3) to make some concrete suggestions for alternatives that will both preserve the rights of parents and children and best protect the emotional

development of the child.

When a mother is arrested, the disposition of her children varies greatly between states and even between jurisdictions within a state. Practices range from permanently terminating the parental rights of certain convicted felons to allowing the mother to provide for temporary child care with relatives or even to allowing the mother to keep the child with her in prison. If a woman has a husband who is willing to care for the children, he will usually be given custody of them, but few incarcerated women are that fortunate.

When parental rights are terminated permanently, it may be done in one of three ways. In a small number of states, such as Oregon and California, statutory law permits the children of certain convicted felons to be kept in state custody or put up for adoption without the consent of the incarcerated parent.[1] A second approach is used by states such as Illinois.[2] There, although the incarceration of the parent per se is not grounds for the termination of parental rights, the conviction is used as evidence that the parent falls into a category of person that is, by definition, unfit for parenthood. The Illinois statute on adoption, for example, lists "depravity" as one of the conditions that makes a person unfit to have custody of a child. In the case of Tiernan v. Stewart,[3] the Illinois Court of Appeals held that "depravity" as defined in that statute could be established by a series of acts or a course of conduct showing an inability or unwillingness to conform to accepted morality, thus leaving the courts with plenty of leeway to terminate the parental rights of any prisoner.

A final way by which incarcerated women may permanently lose access

to their own children is through those statutes which deprive convicted felons of their civil rights. In both New York and Oklahoma,[4] for example, a sentence of imprisonment in a state institution suspends, for the duration of the sentence, all the civil rights of, and all powers held by, the person sentenced. Thus the state does not require the consent of a convicted felon when it puts the felon's child in an institution or even up for permanent adoption. Furthermore, once a woman has been convicted of a felony in New York, and sentenced to a state prison, the fact that she is paroled before her sentence is up, and is therefore physically free to resume her maternal obligations, has been held not to terminate her sentence or restore her civil rights, and therefore her child can still be put up for adoption without her consent.[5]

Fortunately, not all states have been as willing to terminate a prisoner's parental rights as are those I've mentioned. Almost all do, however, as a matter of course, separate the mother and child during the period of the mother's incarceration. In many states the mother is permitted, if she is able, to make her own arrangements for the temporary care of her children. But often the mother has no one with whom she can leave her children. Often the children end up in an institution for neglected children or are placed by the state in a series of foster homes.

It is the thesis of this paper that this abrupt separation of mother and child causes unnecessary psychological damage to both of them, and that this damage could be avoided if criminologists were willing to take a hard look at some research and theory from developmental psychology. Although the law does try to do what is best for the child, too many

people assume that the child's best interests will be served by placing the child in a "good" home -- good being defined in terms of material possessions, educational opportunities, and conformity to middle-class standards of behavior.

Research on attachment and separation, however, shows that a far more critical factor in the development of an emotionally healthy child is a strong and enduring attachment to a primary caretaker. In a normal child, this bond becomes firmly established between the ages of about eight months and two years. There is almost unanimous agreement among experts that if this bond is broken during this critical period, the child may suffer long-term personality disturbances. In other words, breaking the attachment bond, whether to a fit or an unfit psychological parent, is extremely painful and can cause serious psychological damage.[6]

Parenthetically, it should be noted that New York has a statute[7] which permits mothers to keep their infants with them in prison until the children reach the age of one year, at which time they must be removed from the facility. Thus, although someone was obviously concerned with the welfare of the infants involved, the drafters of the legislation made a critical error in requiring that the infants be separated from their mothers at the height of the attachment process.

According to research by Mary Ainsworth,[8] separation from the mother heightens anger, aggression, and hostility in the child, and the long-term outcome of a major separation can be quite pathological. Even if there is a later reunion with the attachment figure, the renewed attachment relationship may be described as shallow, insecure, and anxious.

Many other investigators have examined the reactions of children following separation from their mothers and placement in institutional settings.[9] They've found a sequence of responses following separation, beginning with crying and strong protest, and followed by progressive withdrawal from the environment and from relationships with people. The immediate reaction of protest is thought to represent an active effort to regain the lost mother. After this period of protest, despair and resignation are reflected in increasingly withdrawn and apathetic behavior.[10]

If a substitute mother figure is available, some children may develop an attachment to the substitute mother. However, the attachment is possessive and anxious. If, as is usually the case with children whose parents are arrested, there is a series of changing mother-figures, the child does not form an attachment to any of his caretakers. This pattern of "detachment" is considered by Robertson and Bowlby[11] to be a precursor to the development of the psychopathic personality or what they call the affectionless character. Some retrospective studies find separation from an attachment figure to have been a significant etiological factor in schizophrenia,[12] in neuroses and psychopathic personalities,[13] and in psychosomatic and psychoneurotic disturbances.[14]

It has been hypothesized that the severity of the separation experience may be directly related to its duration. Spitz and Wolf[15] suggested that there may be a crucial time interval after which the effects of maternal separation are irreversible. They place five months as the upper limit for very young children, slighly longer for older ones.

In temporary separations, if the child is able to maintain a relationship with his parents, the impact of the separation is likely to be less

severe than if there's an abrupt and complete termination of the relationship. There are some data showing that the overall adjustment of children in foster care tends to be more adequate if the bond between the parent and child is maintained by frequent visiting. Of course, visiting parents in prison is usually impossible in this country because of current laws which forbid children to be present on prison grounds.

A large number of children who are separated from their natural parents by the state are placed in foster homes to be cared for by foster parents who are reimbursed by the state for their time and expenses. In addition to the damage done to the child by the trauma of the separation itself, damage may be done by the conditions of care. Foster parents know that the child is with them only temporarily. They are warned not to become too attached to the child in order to avoid putting themselves and the child through just one more painful separation. Often neither the child nor the foster parent knows exactly when the child's parent will be released from prison. Thus they are both kept in a state of emotional limbo, and no child can grow emotionally while in limbo. He can only invest in a minimal way if tomorrow the relationship may be severed.[16] Weinstein[17] has found that children placed in foster homes experience identity problems and conflicts of loyalty, and may suffer from anxiety generated by uncertainty about their future.

The mother, too, may suffer great emotional harm when her children are taken from her. Many of the women who go to prison are unmarried and are estranged from their parents. For many of them, their child is their one link to the outside world, their reason to go on living.

Unfortunately, there has been virtually no research on women prisoners specifically addressing itself to the importance of maintaining contact with one's children during incarceration. A few relevant studies do indicate that a lack of family ties is a critical deprivation experience for women in prison which contributes to much situational homosexuality and personal anxieties.[18] Maintaining contact with one's children may or may not alleviate the need for homosexual relationships, but would provide women in prison with love, warmth, a sense of being needed, and a feeling of continuity with the outside world.

Our current system allows little or no contact between mothers and children during the time that the mother spends in prison, even if she is later to regain custody of her children. One of the major problems that a woman may have to confront upon her release from prison may be the obligation to interact with and provide support for her children with little preparation.[19] Finding a job after serving time is difficult, especially if you are a woman; getting on the welfare roles takes time. The situation is bound to be a trying one. It is made unnecessarily trying by the need to interact with children who have become virtual strangers to their mother, and may have lost respect for her and be filled with resentment because of her absence.

It is common knowledge that many ex-convicts return to a life of crime after after a frustrating attempt to gain acceptance in the "straight" world. Prisons make the transition especially difficult for parents by keeping them out of touch with their children for months or even years, and then expecting them to resume their parental roles soon after release or risk losing their children forever. The pressures involved may well lead the ex-convict to return to former friends and former ways of life in order to find the personal

and emotional support to interact with their now estranged children. Farris Lawrence, an ex-convict, commented in a thoughtful article:

> Women have special problems, they have their children. They have children who may have been taught while they were gone that "you're mother is no good, she's not fit." When she returns, this is the major problem that faces her, because her role as mother is the one in which she expects to be accepted. Prisons can do all of the rehabilitating, treating, educating, or correcting that an inmate can absorb, but if she is not accepted by her family the improvement is not going to have a lasting effect.[20]

In addition to the psychological harm done to the child and parent when they are separated, some of their legal rights may be ignored as well. The Supreme Court has held on several occasions that a mother's right to custody of her children is a personal right, and that the integrity of the family is protected by the Due Process Clause of the Fourteenth Amendment.[21] The right to raise one's children has been deemed essential.[22]

Given this constitutional protection afforded the familial bond, one must question the constitutionality of state statutes which use incarceration as an excuse for permanent interference with the parent-child bond. Even in those states which require a separate fitness hearing before terminating the parent-child bond, due process rights are often abused. Despite the fact that the courts have recognized that taking someone's child away from them is one of the most drastic actions a state can take,[23] the proceeding is classified as a civil one and parents aren't afforded the usual protections of a criminal trial. They are not always provided with a lawyer to help them defend themselves, nor are they entitled to standards of proof which require a showing of unfitness beyond a reasonable doubt.

It is possible that the rights of the children involved are also being

violated. A recent federal decision[24] held that inmates of a state facility had a constitutional right to protection from harm and to a minimum quality of care or treatment, even if their confinement was not involuntary. The court pointed out that "...harm can result not only from neglect but from conditions which cause regression or which prevent the development of an individual's capabilities."[25]

If this "right to treatment" or "right to be free from harm" is applicable, as it should be, to all those who are in state custody, the right is not being protected when children are abruptly separated from their parents. If this right to treatment is tested further in the courts, the states may find themselves having an obligation to find an alternative method of handling the children of incarcerated women so as to minimize the harm done to them.

We are left, then, in a very uncomfortable position. Our contemporary practices that have supposedly been designed to promote the public good may be doing damage to both parents and children as well as violating the legal rights of everyone involved. An increasing number of states are eliminating laws that permanently terminate the parental rights of incarcerated women because they have recognized that such practices violate the legal rights of the women involved, and often condemn their children to lives in institutions and foster homes. But permitting women to regain custody of their children once they're released from prison is only the beginning of a solution.

The states must seek alternative ways of handling prisoner-mothers that minimize their children's separation from them. First and foremost, no parent should have her parental rights terminated unless the courts have

proven beyond a reasonable doubt that the parent has engaged in, and is likely to continue engaging in, some behavior that is seriously detrimental to the well-being of the child. Behaviors that are sufficiently detrimental should be clearly spelled out by statute, and the harm should be definite and not speculative. Termination of parental rights on any other grounds is a serious violation of human rights and should be regarded as such.

Given the wide discretion availabe to judges in sentencing, it is hoped that this discretion will be used whenever possible to permit a convicted woman to remain in the community under the supervision of a parole officer and a social worker if she has children to care for. If it does seem necessary that she be sent to prison, the assumption should always be made that when she completes her sentence, she will resume the normal parental role, and she should be given all the support and encouragement possible to help her to be effective in that role.

There does not seem to be any reason why a mother who goes to prison should not be able to keep an infant with her. Prisons in New York already provide facilities for children until they reach the age of one year. Mexican prisons permit mothers to keep even older children with them. The child's most important needs appear to be food, a warm place to sleep, occasional medical care, and, above all else, continuous care and stimulation from an adult who loves him. The buildings are there, and the mother is there, and has a lot of spare time to spend with the child. Prisons may want to leave the children in the cells with their mothers, or they may want to build special nurseries; certainly there should be medical care available in any woman's prison, whether or not there are children there. Arrangements could be made with volunteers to take the children off the prison grounds for outings when

desired, or playgrounds could be constructed on prison grounds. It is myopic of us to assume that every child is entitled to a large house and a garden, or that every child should have the freedom to climb mountains and run in the woods. Most of these children will spend the better part of their lives in city slums anyway. In the prison they can be well cared for and can form the necessary emotional attachment to their own mother which will last far longer than the period of incarceration. It may, of course, turn out that prisons are just bad places to keep children, but we can't know that until we set up experimental nurseries in prisons and follow up the children that spend their early years in them. The available research suggests that the physical environment is not as important a factor in the development of the very young child as is the bond between mother and child.

Once the child reaches the age of three or four, it would probably be best to find a temporary home for the child. By this time the critical period for the cementing of the attachment bond has passed, and exploration and independence become important factors in the child's development. Preference should be given, however, to providing care by a person already well known to the child who lives in or near the community where the mother is incarcerated. Visitation between the mothers and their children should be encouraged, and all efforts should be made to ensure the survival of the emotional bond between the mother and the child. If possible, counselling for both mother and child should be provided. The child should be helped to adjust to the situation, and should have access to state-funded counselling and other support services. Activities involving both mothers and children should be arranged on the prison grounds. The child should be reassured as often as is necessary that he and his mother will soon be reunited on a full-time basis, and that

the mother, too, is looking forward to that time.

If proper facilities are built and maintained, and proper consideration is given to research findings from developmental psychology, it is possible that the harm to children caused by the incarceration of a parent can be minimized. We have been too quick to assume that people who commit crimes make bad parents, and we have paid too little attention to the importance of a strong and permanent attachment to one caregiver for the emotional development of the child. It is time that we began to take steps to correct our mistakes: to fund experimental prison nurseries, and to carefully evaluate the emotional health of the children reared in them. We know that the present system is harming children; we should not hesitate to explore alternatives.

FOOTNOTES

1. Oregon Revised Statutes 109.322; West's Ann. Civ. Code 232d.

2. Illinois Anqotated Statute Chapter 4 9.1-1.

3. 33 Ill. App. 3d 545, 338 N.E. 2d 153 (1975).

4. New York Civil Rights Law 79, Oklahoma Statutes Annotated Title 21 65.

5. In re Adoption of O'Daniel, 128 N.Y.S. 2d 351 (Surr. Ct. 1953).

6. See generally J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child (1973).

7. New York Correction Law, Section 611(2).

8. Ainsworth, The Development of Infant-Mother Attachment. In B. Caldwell & H. N. Ricciuti (Eds.) Child Development Research, University of Chicago Press, 1973.

9. See for example: Spitz, R. A. & Wolf, F. Anaclitic Depression. Psychoanal. Stud. of the Child, 1946, 2, 313-342; Robertson, J. & Bowlby, J. Responses of young children to separation from their mothers. Caurr. Cent. Internat. L'Enfance, 1952, 2, 131-142; Raudinesco, J., David, M. & Nicalas, J. Responses of young children to separation from their mothers: I. Observation of children ages 12-17 months recently separated from their families and living in an institution. Caurr. Cent. Internat. L'Enfance, 1952, 2, 66-78.

10. Yarrow, L. J. Separation from parents during early childhood. In Hoffman & Hoffman (Eds.) Review of Child Development Research, New York: Russell Sage Foundation, 1964, pp. 89-136.

11. Robertson, J. & Bowlby, J. Responses of young children to separations from their mothers. Caurr. Cent. Internat. L'Enfance, 1952, 2, 131-142.

12. Berg, M. & Cohen, B. B. Early separation from the mother in schizophrenia. J. nerv. ment. Dis., 1959, 128, 365-369.

13. Oltman, J., McCarry, J., & Friedman, S. Parental deprivation and the "broken home" in dementia praecox and other mental disorders. Amer. J. Psychiat., 1962, 198, 685-694.

14. Gregory, I. Studies of parental deprivation in psychiatric patients. Amer. J. Psychiat., 1958, 115, 432-444.

15. Spitz, R.A., & Wolf, F. Anaclitic Depression. Psychoanal. Stud. of the Child, 1946, 2, 313-342.

16. Bryce & Ehler, 144 Foster Children, 50 Child Welfare 499, (1971).

17. E. Weinstein, The Self-image of the foster child 15 (1960) at 22-23.

18. See summary in Brodsky, 4 Criminal Justice and Behavior 195 (1974).

19. Fortune News: The Female Ex-Offender, February, 1977, p. 6.

20. Lawrence, An Ex-Offender evaluates correctional programming for women, 4 Criminal Justice and Behavior 390 (1974).

21. May v. Anderson, 345 U.S. 528 (1953); Skinner v. Oklahoma, 316 U.S. 535 (1942); Prince v. Massachusetts, 321 U.S. 158 (1944).

22. Stanley v. Illinois, 405 U.S. 645 (1972).

23. State v. Jamison, 444 P. 2d 15, (Ore. 1968).

24. New York State Ass'n for Retard. Ch., Inc. v. Carey, 394 F. Supp. 715 (E.D.N.Y., 1975).

25. Id at 718.